PROTEST

OF THE

CHEROKEE NATION

AGAINST A

TERRITORIAL GOVERNMENT.

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To the Senate and House of
Representatives of the United States.

Gentlemen: When we observed the above sentiments, uttered with so much force and sincerity, in the able report of the Committee on the Judiciary, submitted to the Senate only last month, which report declared that "the Fourteenth Amendment to the Constitution of the United States, had no effect whatever upon the status of the Indian tribes, within the limits of the United States, and does not annul the treaties previously made between them and the United States," we had hoped and believed that they reflected the views, not only of a large majority in Congress but of the American people; and that the representatives of the civilized Indian nations occupying the Indian Territory West of Arkansas, would speedily be relieved of the disagreeable necessity of visiting Washington, during every session of Congress, to guard their people against the multifarious devices of those who seek to despoil them of their lands under the cover of Congressional legislation.

We regret to say that we have been disappointed in our reasonable expectation. Not only have the obnoxious territorial bills against which we earnestly protested at the last session been revived, but several new bills, having similar objects in view, have been introduced. In no instance is the welfare of the Indians consulted, or sought to be advanced; but in every measure now

pending before Congress, their rights of self-government are invaded, and the attempt is made to render them subject to the political and municipal jurisdiction of the United States Government, at Washington, and the local control of white men at home.

What sort of treatment we may expect under a double-headed government so organized is succintly set forth in the truthful report of the Senate Committee on the Judiciary. If, as they say, "*the white man's treatment of the Indians is one of the great sins of civilization*," what is there in the character of those who constantly assail us, and assume the right to govern us, to justify the expectation that our rights and interests will be better cared for in the future?

After searching through all the acts of Great Britain and the ante-revolutionary acts of the States forming this Union, and carefully analyzing the Constitution, the treaties, the court decisions and acts of Congress regarding the Indians, the Judiciary Committee gravely expresses the conviction that "*an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States, would be unconstitutional and void.*"

The Indian's right to self-government is moreover thus unequivocally set forth:

"Their right of self-government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned; and while the United States have provided by law for the punishment of crimes committed by Indians straggling from their tribes, and crimes committed by Indians upon white men lawfully within the reservations, the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country. *Volumes of treaties, acts of Congress almost without number, the solemn adjudications of the highest judicial tribunal of the republic, and the universal opinion of our statesmen and people, have united to exempt the Indian, being a member of a tribe recognized by, and having treaty relations with, the United States from the operation of our laws, and the jurisdiction of our courts.* Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members, except

when such members were separated from the tribe to which they belonged; and then we have asserted such jurisdiction as every nation exercises over the subjects of another independent sovereign nation entering its territory and violating its laws."

We see no present reason for disturbing the above relations, so long established, especially with the self-governing civilized nations and tribes of the Indian Territory. They have their local laws and forms of government, modelled after those of the States; and have recently, in accordance with treaty stipulations entered into in 1866, through a general council of delegates from the various nations, framed a constitution for a confederated government, representing all the Indians in said Territory, for the purpose, as set forth in the preamble, of "arranging the machinery of a government for the country occupied and *owned by them*, in order to draw themselves together in *a closer bond of union, for the better protection of their rights, the improvement of themselves and the preservation of their race.*"

The constitution which follows, accords with the spirit and declaration of the preamble. It forms an Indian confederation or government of the Indian people, by the Indian people, for the Indian people. This government is within their treaty rights, involves no breach of obligation with the United States, conforms to the constitution, treaties and laws of the United States, and declares that all political power resides in the people of the several nations, who have at all times the right to abolish or reform it Following closely the Federal Constitution, it also contains this reservation, "All powers not herein expressly granted by the nations, parties to this constitution, *are reserved by them* respectively, according to the provisions of their several *treaties* with the United States."

There is no analogy, between this government, so created, and the ordinary "territorial governments" organized by authority of Congress. This is a confederation entered into by several Indian nations, whose rights as distinct political communities are as well established as the constitution, treaties, laws, precedent and immemorial usage can make them. The chief parties to this compact are the Cherokee nation, the Choctaw and Chickasaw nations, the Creek nation and the Seminole nation.

In 1831, the Cherokee nation *vs.* The State of Georgia, 5 *Peters*, 1, Chief Justice Marshal says:

"Is the Cherokee nation a *foreign state* in the sense in which that term is used in the Constitution? The counsel for the plaintiff have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.*"

The distinctive nationality of the Creeks, Choctaws, Chickasaws and Seminoles, has also been as authoritatively recognized, and the Supreme Court, in 6 *Peters*, 515, announced the following proposition, viz:

"From the commencement of our Government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

Chief among the rights inherent in a people, is the right to form a government suited to their condition, and the Congress of the United States will ignore the principles of the fathers, and the Bill of Rights of every State in the Union, if it attempt to deny that right to the Indians.

It appears to be assumed that the action of these independent Indian nations, in forming a Federal Government requires ratification at the hands of Congress, to give it validity, and bills have been offered which do not so much propose to ratify and confirm, as to alter and amend their organic law

It is by no means clear that Congressional action is at all necessary. Its ratification of the Constitution, as it emanated from the General Council at Oakmulgee, would be an act of supererogation, because the authority of the Indian nations to govern themselves is firmly established, and the treaties recognize their systems of confederation and naturalization. This is not the first Indian confederation ever formed, by any means, although it may

be the first which has organized under a written constitution like that of the United States.

It is true that the summoning of a general council was provided for in the treaties of 1866, entered into between the United States and the Cherokees, Creeks, Choctaws and Chickasaws and Seminoles, respectively, which specified the powers said council should possess, and provided for their *enlargement* "*by the consent of the National Council of each nation or tribe assenting to its establishment with the approval of the President of the United States.*"

The President of the United States is the recognized father of all the Indian tribes, and the negotiator of this general council. His approval of the enlargement of its powers herein consented to, was necessary as a consignor of the treaty, and in recognition of the dependent relations of the Indians as wards of the United States; but it cannot be regarded as a limitation upon their inherent rights. It does not give either the President or Congress the power to dictate to the Indian nations what form of government they shall adopt, or to alter the one framed by their General Council, but still awaiting the separate endorsement of each of the said nations interested therein.

Dependence does not destroy sovereignty, for as the Senate Juciary Committee says with reference to the Delawares:

"The dependence of the tribe upon the United States is fully recognized by the fifth article of the treaty; but this was not regarded as depriving the tribe of their character as a nation or political community, because the treaty stipulates for many acts to be thereafter performed by the Delawares, which can only be performed by a separate community, independent of external municipal jurisdiction. *Indeed such dependence is in no way incompatible with the idea of separate nationality. Sovereign states may be bound together by treaty alliances very unequal in their terms, and still remain sovereign states. (Vat., B. 1, ch. 26, sec. 194.)*

Senate bill, No. 1,237, which was introduced by Mr. Harlan on the 20th January, 1871 read twice, referred to the Committee on Indian Affairs, and ordered to be printed, is entitled "An act to ratify and carry into effect the constitution and form of government for the Indian Territory, adopted December 20, 1870, at

Okmulgee, by the general council of said Territory, held by authority of the Government of the United States."

The first section of this bill affirms said constitution and form of government and declares it to be the fundamental law for said Territory, "*with the modifications and exceptions hereinafter set forth.*" The second section embraces "the modifications and exceptions" which seriously impair the merits of said constitution, destroy the autonomy of the confederated Indian nations and tribes which framed it, and invade their treaty rights especially reserved in the "Declaration of Rights" embodied in and forming a part of said Constitution.

The constitution adopted at Oakmulgee provides for the security of said Indians, and the preservation of their race through the reservation of their treaty rights, and the machinery of a government in which the governor and legislature are elective by the people. The judges are appointive by the governor, whose powers and duties are similar to those of the President of the United States. He has the veto power. All minor offices created by law will be subject to his appointment. The Executive office is the axis around which the entire system revolves. Every other prominent feature relates to that, and the whole constitution is framed in view of the election of an Indian governor by the people, and the appointment of an Indian judiciary by the governor. Yet Mr. Harlan's bill gives the appointment of these important officers and others to the President, as if this were a mere territorial government organized under authority of Congress. We wish this fact to be kept constantly in view, that we have the inherent and inalienable right of self-government recognized and guaranteed by treaty—that this new constitution does not form a *territorial government* in the ordinary acceptation of that term, intended to be subjected to the capricious legislation and political manipulations of Congress, but a Federal Republic of Indian States, composed of a peculiar population, who wish to preserve their independence, perpetuate their race, make and administer their own laws, and protect their lands from the insatiate rapacity of organized land pirates, a class of men with as well defined characteristics as gold misers, and equally as well entitled to distinctive classification. This class, whose capacity for absorbing the soil is one of the marvels of Western civilization, has "an appetite which grows with

what it feeds on,"—a boundless greed that cannot be assuaged, and although it has already appropriated the best part of the public domain belonging to the people of the United States, who at least had much to give, it will remain unsatisfied until allowed to plunder the Indians of their small territory.

Every attempt to territorialize us is an attempt to break down the treaty barriers which keep the speculators and railroad land-grabbers off of our possessions.

Our lands belong to us. They are private property, held by the Indian nations in their corporate capacity, under patents issued by the United States Government. These patents are our title deeds, as good as any preemptor's or purchaser's patent for his quarter section, as good as any recorded deed recognized by the Courts of the United States. There are several hungry railroad corporations awaiting the extinguishment of "the Indian title" to our lands in order that they may appropriate them to their own uses. The titles of the nations in the Indian Territory are not mere Indian titles of occupation. The Creeks, Cherokees, Choctaws, Chickasaws and Seminoles parted with their aboriginal titles to their possessions in the States of North Carolina, Georgia, Alabama, Mississippi, Florida and Tennessee, when they removed therefrom and took United States titles in fee simple for the lands they now hold. Their possessions are regularly patented to them. Upon this subject we beg leave to quote the opinion of Attorney General Berrien, dated December 21, 1830. He says:

"It is true that the Cherokees west of the Mississippi have acquired by the treaty of 1828, a permanent title to the lands specified in that instrument, because they have the *perpetual guaranty* of the United States, and that the tenure by which they hold is in that respect different from the ordinary Indian title of occupancy. It is admitted too, that since these lands at the time of executing that treaty were the property of the United States, this Government had power thus to convey them, and, consequently, that the title held by the Cherokees is such as the treaty in terms describes it to be."

Notwithstanding this, Senate Bill, No. 1,186, to organize the Territory of Oklahoma, introduced by Mr. Jewett, proposes to treat our property as if it belonged to the United States, graciously allots a quarter section *per capita* to the Indian, and directs entry

by the United States on the remainder. It proposes to establish a land office in the Indian Territory and open our lands to settlers.

The United States have as clear a right to enter into possession of Mr. Jewett's farm, if he is so fortunate as to possess one. When they resume possession of all the land in private hands held under patents issued since 1835, we shall expect to see them take ours from us, not before.

So long as the Judiciary Committee of the Senate is composed of eminent statesmen and lawyers who can utter an indignant rebuke to the schemers that attempt to destroy us in such language as the following, we shall not despair.

"To maintain," says the committee, "that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, *to annul treaties then* existing between the United States as one party, and the Indian tribes as the other parties respectively, would be *to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights, and were enjoying the voluntarily assumed guardianship and protection of this Government.*"

It is unfortunate for the Indians, that those who have the most direct interest in their spoliation, are the very men who set up a special claim to regulate Indian affairs. The white men West of the Mississippi, send representatives to Congress, who claim by their proximity to the Indian country, to know more of their requirements, than Congressmen who come from further East, or the Indians themselves. They also frequently claim and obtain the governorship of territories. The Indians have no vote, and it is the voting constituency which desires to despoil the Indian, that controls the action of this class of men.

From these facts it will readily be anticipated what character of white rulers we shall have in the Indian Territory if Mr. Harlan's amendment should pass, and any attempt was made to enforce it as law. We intend no reflection on any one, far less upon the present distinguished President of the United States, whose sympathy with the oppressed Indian is always manifest. What we object to is the system. The covert purpose of the influence which secures an appointment is rarely known to the appointing

power, and is often unknown to the appointee until it assumes control of his action.

Even supposing that the approval by the President and consent of the National Council of each nation assenting, should be deemed insufficient to give validity to this Oakmulgee constitution, why can it not be ratified in the form in which it emanated from its makers?

A people who now elect their chiefs, who own the real estate within their territory and have long been accustomed to administer their own laws, may surely be permitted to elect their governor and select their judiciary, while it is quite certain they have the right to refuse and will refuse their assent to substituting appointees of the President. This, of course, does not apply to Judges of United States Courts, to the organization of which consent has been given in the treaties of 1866.

The Secretary of the Interior, in a letter to Mr. Shanks, dated January 19th, 1871, very properly advocates this view in the following language:

"It is my opinion that the Indian tribes not now represented in this confederate government will gradually come into the Indian country, taking reservations and becoming part and parcel of this confederation; that they will more readily receive a government of which they feel themselves to be the authors, than one which they may regard as forced upon them, and which will be controlled by officers not designated by themselves, and not of their own nationality. I believe it is the opinion of the Commissioner of Indian Affairs, and also of the most intelligent and reliable Indian agents and superintendents, that we had better adopt this course rather than to attempt at present to force upon the Indians what is termed a territorial government."

The Secretary appreciates the importance to the Indians of officers of their own nationality; and deprecates any attempt to force upon them "*a territorial government.*"

Mr. Harlan's amendment to the Oakmulgee constitution, would transform it at once into that very thing. It would be the entering wedge which would rive the oak of our nationality. From the day it would be in the power of the President of the United States to appoint a white man from outside our borders, to rule over us, our Indian State would decay. The municipal subjugation of the nations would be completed by their acceptance of alien rule;

their treaty rights would be superceded by territorial enactments controlled by the veto power of a white governor, who would continue what the Judiciary Committee so tersely call "*the great sins of civilization.*" The white governor would as inevitably represent some of the rings that seek to despoil us, as he would get his appointment. The gubernatorial powers, intended for an elective Indian governor with a two years term, instead of an appointed white governor for a four years term, are equal, in their limited sphere of action, to those of the President of the United States in his, and they would be augmented by Congress when once, through an abandonment of their treaty rights, the Indians subjected themselves to Congressional control. The governor can veto measures of importance to our domestic interests, and thereby impede or altogether defeat necessary legislation. He could appoint white men to office. He could pardon criminals convicted by our courts for offences against Indians. He could remit fines and penalties for breaches of our laws, and if disposed to abuse his high office might reverse the the whole order of society, by subjecting us to the domination of our enemies. Such things are not strange to the experience of some of the self-governing States of this Union, and we may therefore be excused for the apprehensions we feel upon the subject. A Vigilance Committee, may receive the endorsement of a grand jury in California; but if one should become necessary for self-protection in the Indian Territory, it would be declared an Indian war, calling for our extermination.

As a concluding argument against subjecting us to white rule, we beg to call your attention to the following remarks of Senator Thomas H. Benton, on the effects of our removal to our present home:—"With the Indians," said he "it was a question of extermination, the time only the debatable point. They were daily wasting under contact with the whites, and had before their eyes, the eventual but certain fate of the hundreds of tribes found by the early colonists on the Roanoke, the James river, the Potomac, the Susquehanna, the Delaware, the Connecticut, the Merrimac, the Kenebec and the Penobscot. The removal saved the Southern tribes from that fate; and in giving them new and unmolested homes beyond the verge of the white man's settlement, in a country temperate in climate, fertile in soil, adapted to agriculture and to pasturage, with an outlet for hunting, abounding with salt water

and salt springs, it left them to work out in peace, the problem of Indian civilization."

May we not still be left in possession of the limited tract that remains to us of all this vast country, or will "the harsh treatment of the race by former generations be considered a precedent to justify the infliction of further wrongs?"

Very respectfully,

LEWIS DOWNING,
Principal Chief Cherokee Nation.

W. P. ADAIR,
C. N. VANN,
SAMUEL SMITH,
GEO. W. SCRAPER,
Cherokee Delegation.

WASHINGTON, *January* 30, 1871.

If you would mail me your remarks
I will ~~post~~ publish them.

Monicelli